Supreme Court, U.S.
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In the Supreme Court of the United States

BOCA INVESTERINGS PARTNERSHIP, A PARTNERSHIP, AND AMERICAN HOME PRODUCTS CORPORATION, TAX MATTERS PARTNER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal income tax law recognizes a partnership if taxpayers have a non-tax business *purpose* to form the partnership (as the United States Court of Appeals for the Sixth Circuit and the United States Tax Court hold), or whether federal income tax law recognizes a partnership only if taxpayers have a non-tax business *necessity* to form the partnership (as the District of Columbia Circuit held in this case).

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit: Petitioners Boca Investerings Partnership and American Home Products Corporation* and Respondent United States of America.

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* Pursuant to Supreme Court Rule 29.6, Petitioners state that Boca Investerings Partnership was an investment partnership formed by: American Home Products Corporation ("AHP"); AHP Subsidiary 10; Addiscombe Corporation N.V. ("Addiscombe"); and Syringa Corporation N.V. ("Syringa"). On March 11, 2002, AHP changed its name to Wyeth.

Of the four partners, only AHP (now Wyeth) is publicly held. No publicly held corporation has a 10% or greater interest in Wyeth. Algemene Bank Nederland N.V. (predecessor of ABN AMRO Holding N.V.), the indirect parent of Addiscombe and Syringa, has issued shares and/or debt securities to the public.

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In the Supreme Court of the United States

BOCA INVESTERINGS PARTNERSHIP, A PARTNERSHIP, AND AMERICAN HOME PRODUCTS CORPORATION, TAX MATTERS PARTNER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Boca Investerings Partnership and American Home Products Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 314 F.3d 625. The opinion of the district court (App. 17a-237a) is reported at 167 F. Supp. 2d 298.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2003. A petition for rehearing was denied on March 26, 2003. App. 239a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

Sections 761(a) and 7701(a)(2) of the Internal Revenue Code of 1986, as amended, are reprinted at App. 240a-41a.

STATEMENT OF THE CASE

Petitioner American Home Products Corporation ("AHP") and three other parties formed an investment partnership called Boca Investerings Partnership ("Boca").[1] The purpose of the partnership was to invest more than one billion dollars in notes, bonds, debentures, and other interest bearing instruments. *See* App. 78a. As a result of the partnership's investments, AHP claimed losses, which the Government denied. AHP paid the tax and filed suit in the United States District Court for the District of Columbia.

Following 17 days of trial at which 27 witnesses testified, and after receiving more than 3,000 pages of documentary evidence and briefs, the district

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[1] Boca is also a petitioner.

court ruled in favor of Petitioners and rejected the Government's proposed tax adjustments. On the critical issue whether the parties had entered into a partnership, the district court found that "the evidence presented at trial proves that in operation 'the parties in good faith and acting with a business purpose intended to join together in the present conduct of [an] enterprise,' by sharing in the income, expenses, gains, and losses of the partnership in accordance with the Partnership Agreement." App. 195a (quoting *Comm'r v. Culbertson*, 337 U.S. 733, 742 (1949)). The district court expressly found that "there was a legitimate business purpose for the creation of the partnership." App. 198a. Accordingly, the district court recognized Boca as a partnership for tax purposes.

The United States Court of Appeals for the District of Columbia Circuit reversed. It commended the district court's "well-documented and cross-referenced 180 page opinion which included 392 separate findings of fact, as well as conclusions of law." App. 9a. Accordingly, the court of appeals held that the district court's factual findings were not clearly erroneous. *See* App. 9a-10a. Nevertheless, the court of appeals held *sua sponte* that "the district court erred as a matter of law when it did not . . . requir[e] that a legitimate non-tax business necessity exist" for the partnership. App. 10a. The court concluded: "Without a finding on the business need for the partnership from AHP's standpoint in this transaction, the judgment under review cannot stand." App. 13a.

1. The district court analyzed the partnership issue under the intent test set forth by this Court in the leading partnership case of *Commissioner v. Culbertson*, 337 U.S. 733, 742 (1949). In *Culbertson*, this Court held that whether a partnership is recognized for income tax purposes depends on whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." App. 185a-86a.[2]

Applying the *Culbertson* test, the district court concluded that Boca was a partnership:

> Based upon the evidence presented at the trial and through deposition testimony, the Court finds by a preponderance of the evidence that the parties intended to and did in fact organize Boca as a partnership. All witnesses with any direct knowledge of the events in question so testified . . . and all of the relevant

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[2] *Culbertson* construed section 3797 of the Internal Revenue Code of 1939, which provided that the term "partnership" includes "a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization." The same definition of partnership, first adopted by Congress in the Revenue Act of 1932, appears in the current Internal Revenue Code of 1986, as amended, at 26 U.S.C. §§ 761(a) and 7701(a)(2), which are reprinted at App. 240a-41a.

> documentary evidence supports that finding. From the outset, the intent of the parties was to organize Boca as a partnership. No other type of entity was ever contemplated, nor was any action taken by any party that was contrary to that intent.

App. 188a. The district court reasoned that "the mutual intent to form a partnership in accordance with the Partnership Agreement – including the joint contributions to capital, mutual decision-making, and the sharing of income, expenses, gains, and losses – established a partnership for federal income tax purposes under the tests of *Culbertson*." App. 192a. The district court explained that the parties had a non-tax business purpose for the "creation of and investment in the Boca Investerings Partnership . . . , namely to make investments that would generate profit." App. 209a. [3]

The district court rejected the Government's argument that the Boca partnership was fundamentally the same as the partnership in *ASA Investerings Partnership v. Commissioner*, 201 F.3d 505 (D.C. Cir. 2000). In *ASA Investerings*, the parties had entered into a side agreement (the so-called "Bermuda Agreement") under which one party agreed to pay all the expenses, bear all the risk, and pay the other parties a specified return. The district

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[3] Findings and conclusions relevant to the partnership issue appear throughout the district court's opinion. The most important factual findings appear at App. 75a-82a and App. 139a-40a, and the most important conclusions of law appear at App. 185a-202a.

court below pointed out that "[n]ot one of these facts – or any comparable facts – exists here." App. 220a. As a result, the district court concluded that *ASA Investerings* was "materially different" from this case. App. 219a. The district court explained:

> The evidence admitted at trial in this case demonstrates that the relationship among the parties was different from the relationship of the parties in *ASA Investerings*. . . . There is no credible evidence in this case of a "Bermuda Agreement," or of an agreement by the AHP partners to a specified return for the foreign partners, or an agreement that the AHP partners would bear any loss or pay all of Boca's expenses. . . . [T]he overall return of the foreign partners from their investment in Boca was dependent on the success of Boca's investments. This is a crucial difference between this case and *ASA Investerings*.

App. 221a (record citations omitted).

2. On appeal, the Government did not dispute that Boca should be taxed as a partnership if the parties formed it in good faith and with a business purpose to share gains and losses from the joint enterprise. Indeed, the Government did not request *de novo* review of the legal standard applied by the district court. *See* Gov't C.A. Br. 22-23, *reprinted at* App. 242a. Instead, the Government contended that the district court's factual findings with respect to the partnership issue were clearly erroneous. *See* Gov't C.A. Br. at 22-42.

Although the Government did not challenge the legal standard that the district court had applied, at oral argument, one member of the panel asked the Government if "[w]e still have to ask whether or not this partnership was needed to accomplish the economic benefits through these various investments." Tr. 18.[4]

The court of appeals reversed the district court's judgment on the basis of the legal standard suggested for the first time at oral argument. At the outset, however, the court of appeals rejected the Government's contentions that the district court's factual findings were clearly erroneous. *See* App. 9a (stating that "these findings of fact do not constitute clear error by the district court"). The court of appeals therefore approved the district court's factual findings, including its finding that the parties had a business purpose for the formation of Boca.

Nonetheless, the court of appeals reversed "as a matter of law" on the ground that the district court failed to "requir[e] that a legitimate non-tax business necessity exist" for the formation of the partnership. App. 10a. According to the court:

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[4] The parties submitted post-argument letters to the panel in light of the panel member's question. Consistent with its merits briefs, the Government's letter reiterated the business purpose test. The Government did *not* advocate that partnerships could be respected for tax purposes only upon demonstration of a non-tax business necessity. *See* Gov't C.A. Letter at 4-5.

> In order to satisfy the legal test for this type of partnership, the district court must have found a non-tax business purpose *need* for the partnership in order to accomplish the goals of the partners. In this case, there is no evidence of any *need* for AHP to enter into the Boca partnership with the newly-minted Addiscombe and Syringa in order to invest in the LIBOR [London Inter-Bank Offering Rate] notes and PPNs [Private Placement Notes].

App. 14a (emphasis added). The court concluded: "Without a finding on the business need for the partnership from AHP's standpoint in this transaction, the judgment under review cannot stand." App. 13a.

In the concluding paragraph of its opinion, the court of appeals attempted to limit the reach of its decision to "elaborate partnerships with entities created solely for the purpose of the questioned transaction" and insisted that "[w]e do not of course suggest that in every transaction using a partnership a taxpayer must justify that to form." App. 15a-16a. But "[b]ecause the district court did not find that a legitimate, non-tax necessity existed for the formation of the Boca partnership, and because the evidence of record would not have supported such a finding if made, we reverse and remand this case to the district court for proceedings consistent with this opinion." App. 16a.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve the conflict between the United States Court of Appeals for the Sixth Circuit and the United States Tax Court, on the one hand, and the United States Court of Appeals for the District of Columbia Circuit, on the other hand, regarding the standard for recognition of partnerships under the Internal Revenue Code. The Sixth Circuit and the Tax Court both hold that federal income tax law recognizes a partnership if it was formed with a non-tax business *purpose*. Both expressly reject a requirement of non-tax business *necessity*. By contrast, the D.C. Circuit below held that federal income tax law recognizes a partnership *only* if there was a non-tax business necessity for its formation.

The difference between the business purpose and business necessity tests will be outcome determinative in the common case in which the parties to a transaction had a subjective *purpose* to share the gains and losses in an enterprise, but had no objective *need* to form a partnership.

Indeed, based on the court of appeals' view of the record, the different legal standard was outcome determinative in the present case. The court of appeals below approved the district court's 392 findings of fact, including the finding that the parties in good faith and with a non-tax business purpose intended to form and did form a partnership. *See* App. 9a-10a. Thus, the non-tax business purpose test was satisfied. The court of appeals reversed only because, in its view, the facts

of record in this case did not prove there was a non-tax business *necessity* for petitioners to form a partnership. *See* App. 16a.

This Court should resolve the conflict now to avoid discouraging economically beneficial activity that historically has been conducted through partnerships and to ensure consistent tax treatment of existing partnerships. Regardless of whether questions as to the proper tax treatment originate from one or another party to a proposed partnership or are anticipated to be raised subsequently by the Government, the uncertainty surrounding such treatment of the joint enterprise will create friction in the marketplace and have a chilling impact on commercial dealings.

In addition, the D.C. Circuit's decision creates uncertainty as to the tax treatment of existing partnerships. In the D.C. Circuit, joint ventures that would otherwise be treated as partnerships for tax purposes must now be reclassified if the parties could have achieved their non-tax objectives without using the partnership form. The tax treatment of those joint ventures now depends not on the terms and legal rights created by the arrangement selected by the parties, nor on the purpose of the parties, nor even on the substance of the arrangement, but on whether there was a non-tax business necessity for the parties to have agreed to such terms. Because *necessity* is a hurdle that few partnerships can surmount, the D.C. Circuit's decision creates a new and undefined class of joint venture whose tax treatment is not contemplated by the Internal Revenue Code.

I. The D.C. Circuit's Decision Conflicts with Decisions of the Sixth Circuit and the Tax Court.

Decisions of the Sixth Circuit and the Tax Court reject the requirement imposed by the D.C. Circuit below that taxpayers prove a non-tax business necessity in order for a partnership to be recognized for federal income tax purposes. The difference between a non-tax business purpose and a non-tax business necessity is determinative of the tax treatment of many, if not most, partnerships.

A. The Sixth Circuit and Tax Court Expressly Reject the Requirement of a Non-Tax Business Necessity To Form a Partnership.

The Sixth Circuit expressly rejected a non-tax business necessity standard in *Miller v. Commissioner*, 183 F.2d 246 (6th Cir. 1950). In *Miller*, the Sixth Circuit reviewed a Tax Court decision that disregarded a partnership. The Tax Court had found that "petitioner had no need or obligation to make his wife and children partners in his business, and there was no benefit to the business in making them partners." *Id.* at 254. The Sixth Circuit expressly rejected the requirement of a non-tax business necessity:

> The determining question is whether the [parties] really intend to carry on the business as copartners. . . . *The test, of course, is not whether there is a need or obligation on the*

> *part of a businessman to make his wife and children partners in his business*, or whether any benefit results to the business.

Id. at 253–54 (emphasis added).

Miller was on appeal to the Sixth Circuit when this Court decided *Culbertson*. *See id.* at 249. As the Sixth Circuit explained in *Miller*, *Culbertson* held that the test for determining whether a partnership will be recognized for tax purposes is "whether, considering all the facts . . . the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." *Id.* at 249 (quoting *Culbertson*, 337 U.S. at 742). In reversing the Tax Court in *Miller*, the Sixth Circuit simply followed this Court's decision in *Culbertson*.

The non-tax business necessity requirement was likewise rejected by the Tax Court in *Nichols v. Commissioner*, 32 T.C. 1322 (1959), which was decided subsequent to *Culbertson*. In *Nichols*, the Tax Court stated:

> We do not understand the phraseology used in the *Culbertson* case, "acting with a business purpose," to mean that the formation of a partnership was *vital or even beneficial to the conduct of the business*. If the individuals decide to pool their capital and/or efforts in a business and choose the partnership form for conducting the business and actually conduct it in that form, we believe that is what is required. *The fact that the business could have been conducted just as well in some other form*

> *is not controlling. That is only one factor to be considered in determining the true intent of the parties.*

Id. at 1330 (emphasis added).

The non-tax business necessity test adopted by the D.C. Circuit below conflicts directly with the decisions of the Sixth Circuit in *Miller* and the Tax Court in *Nichols*. In the Sixth Circuit and the Tax Court, if the trial court finds that the parties, in good faith and acting with a business purpose, joined together to share gains and losses as partners, then the partnership *must* be respected for federal income tax purposes.

By contrast, although the trial court made precisely this finding in this case, the D.C. Circuit held that the partnership would not be respected for federal income tax purposes unless the parties also proved that there was a non-tax business necessity for the formation of the partnership. Although the D.C. Circuit cited *Culbertson* three times (*see* App. 10a, 12a), it never attempted to reconcile its non-tax business necessity test with the test this Court set forth in *Culbertson*.[5]

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[5] The decision of the D.C. Circuit also conflicts with decisions of the Second, Eighth, and Tenth Circuits. The D.C. Circuit held that federal income tax law recognizes a partnership only if the parties had a non-tax business necessity for its formation. By contrast, the Second, Eighth, and Tenth Circuits have held that no single factor is dispositive. *See, e.g., Nelson v. Seaboard Surety Co.*, 269 F.2d 882, 886 (8th Cir. 1959) (stating that the

B. The Difference Between Non-Tax Business Purpose and Non-Tax Business Necessity Is Outcome Determinative in Many Cases.

1. The difference between the business purpose and business necessity tests will determine the federal income tax treatment of partnerships in the common case in which the parties to the transaction had a business purpose to form a partnership to share the gains and losses from their joint enterprise, but cannot prove that formation of the partnership was necessary to accomplish the objectives of the venture. *See, e.g., Whayne v. Glenn*, 222 F.2d 549, 551 (6th Cir. 1955) ("If the ownership is real, it does not matter what motivated the transfer or whether or not the business profited from

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parties' intention to form a partnership "is a question of fact, to be determined from testimony disclosed by their agreement considered as a whole, and by their conduct in execution of its provisions. *There is no arbitrary test for determining the existence of a partnership.* Each case must be determined upon its own facts.") (emphasis added and internal citations omitted); *Levin v. Comm'r*, 199 F.2d 692, 694 (2d Cir. 1952) ("But the *Culbertson* case does not require active participation to make a person a partner for tax purposes. On the contrary, it made it clear that *no one element is essential.*") (emphasis added); *Jones v. Baker*, 189 F.2d 842, 844 (10th Cir. 1951) ("The contribution of capital, labor or skill by the new partner is often important indicia in determining the bona fides of the transaction, but each case must rest on its own facts to ascertain the true intent of the parties, and *such mechanical criteria are not conclusive.*") (emphasis added).

the entrance of the new partner."); *Greenberger v. Comm'r*, 177 F.2d 990, 994-95 (7th Cir. 1949) (holding a family partnership that included the taxpayer's wife and minor children valid for tax purposes, because the parties satisfied the *Culbertson* intent test); *Chisholm v. Comm'r*, 79 F.2d 14, 15 (2d Cir. 1935) (recognizing a partnership formed by two brothers for the purpose of "postpon[ing] and perhaps altogether escap[ing], the taxes which would otherwise become due upon the sale" of appreciated securities, because the partners intended to form a partnership).

In each of the foregoing cases, there was a non-tax business purpose to form the partnerships at issue, and all of those partnerships were recognized for tax purposes. But in none of those cases could the parties have established a non-tax business necessity to form the partnerships at issue, as is required by the D.C. Circuit under its holding in the present case.

2. The outcome-determinative effect of the difference between the non-tax business purpose and non-tax business necessity tests is evident in this case. The parties formed Boca to invest jointly more than one billion dollars and to share the gains and losses resulting from that investment. The district court found that the parties joined together in good faith to conduct a business. *See* App. 195a. Although the court of appeals approved that factual finding (App. 9a), and although it rejected the Government's accusation and accepted the district court's finding that Boca "was not a sham partnership" (App. 10a), it nonetheless reversed on the ground that the

district court "erred *as a matter of law* when it did not . . . requir[e] that a legitimate non-tax business necessity" justify the formation of the partnership (App. 10a (emphasis added)).

The judgment in this case would have been the exact opposite in the Sixth Circuit or the Tax Court. The facts accepted by both courts below are that Boca "was formed for the purpose of making investments in notes, bonds, debentures, and other interest bearing instruments . . . [and] sharing the profits and losses therefrom" (App. 78a (internal quotation marks omitted)); that the parties reasonably expected to make a profit (App. 152a); that the parties intended that "the income, expenses, gains, and losses of the Partnership be shared in accordance with the Partnership Agreement" (App. 78a); that each of the parties shared real risks (App. 81a); and that the parties each genuinely believed that Boca was a real partnership (App. 82a).

Under the law as applied by the Sixth Circuit and the Tax Court, those facts would have required recognition of Boca as a partnership for federal income tax purposes. The D.C. Circuit reached a different result only because it applied a different legal standard to the facts as it viewed them.

II. The D.C. Circuit's Decision Is Far-Reaching and Will Have Significant Economic Consequences.

A. The D.C. Circuit's Decision Will Discourage Economically Beneficial Activity.

The impact of the D.C. Circuit's decision will be felt far beyond this case. Millions of jointly-held business and investment arrangements are organized so as to be eligible for partnership tax treatment. These include: (i) private equity funds, venture capital funds, hedge funds, and other investment funds;[6] (ii) business joint ventures;[7] (iii) diversified investment portfolios;[8] and (iv) family

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[6] For example, real estate investment trusts – or REITs – typically acquire property through partnerships for tax reasons. Such partnerships have been the source of billions of dollars of public market capital for real property investment and have afforded indirect ownership interest in real property to millions of investors.

[7] For example, high technology companies frequently form partnerships and contribute their valuable patents in order to exploit their combined technology without the substantial tax that would be due if they had merely exchanged interests in their patents.

[8] Partnerships allow individual investors to diversify their investments without incurring current capital gains tax. *See* Toddi Gutner, *Exchange Funds: Time to Swap 'n' Save?*, BUSINESSWEEK ONLINE, Aug. 9, 1999, *at* http://www.businessweek.com/1999/99_32/b3641125.htm

farms and other family businesses.[9] For the year 2000, more than 2 million partnerships returns were filed, reporting more than $2 trillion in receipts to the Internal Revenue Service.[10]

The D.C. Circuit's decision requires that the partnerships described above be disregarded where the parties could have entered into non-partnership arrangements that still achieved their non-tax objectives. For example, investors can own securities or hold interests in real property directly, or through non-partnership contractual relationships, rather than through a partnership. Similarly, businesses can exchange interests in patents and other property and separately exploit such property without a partnership.[11] The parties have a non-tax business

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(stating that funds that allow such diversification recently have attracted $5 billion of investments).

[9] In the vast majority of family partnerships, the family members will lack a non-tax business necessity for use of a partnership. A significant motivation is the income and estate tax advantages of a partnership. *See, e.g.*, Katherine D. Black, Stephen T. Black, and Michael D. Black, *When a Discount Isn't a Bargain: Debunking the Myths Behind Family Limited Partnerships*, 32 U. MEM. L. REV. 245, 250-51 (2002).

[10] *Joint Committee on Taxation Report on S Corporations* (JCX-62-03) at 20 (June 18, 2003).

[11] Indeed, in many instances, businesses would prefer to avoid the partnership form, absent tax considerations. *See* James M. Boyle. Gary C. Karch and Adam J. Narot, *Alliances Not in Partnership or Corporate Form – Will You Be My Partner? No Thanks*, 72 TAXES 812, 815-16 (1994). However, the tax cost of exchanging interests in

purpose for having chosen a partnership, but they lack a non-tax business *necessity* to use a partnership.[12] They choose partnership tax treatment because of its tax advantages.

By disregarding partnerships that lack a non-tax business necessity, the D.C. Circuit's decision discourages economically beneficial activity. This is the case not only for business joint ventures involving a few large participants but also for widely-held investment partnerships. Typically, potential investors in such investment partnerships are provided with prospectuses or private placement memoranda, mandated by federal and state securities laws, that describe the significant features of the investment. Potential investors decide whether to invest in the partnership in reliance on the tax treatment described in the prospectus or private placement memorandum, which in turn relies on the opinion of tax counsel. In light of the D.C. Circuit's decision, the tax opinion may be qualified or withheld. Investors who are not confident about the tax consequences simply may not invest. Given the prevalence of partnerships as

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valuable assets in a taxable transaction, rather than using a partnership, is often prohibitive.

[12] Although the partnership form is used to reduce taxes, "[t]he fact that favorable tax consequences were taken into account . . . on entering into the transaction is no reason for disallowing those consequences. We cannot ignore the reality that tax laws affect the shape of nearly every business transaction." *Frank Lyon Co. v. United States*, 435 U.S. 561, 565 (1978).

investment vehicles, the economic damage is likely to be considerable.

These concerns are not alleviated by the D.C. Circuit's attempt – perhaps in tacit recognition of its departure from this Court's decision in *Culbertson* – to limit the reach of its opinion to undefined "elaborate partnership[s]." App. 15a. All of the partnerships discussed above are "elaborate" – financially, legally, and commercially. In the face of a business necessity standard that often cannot be met, qualified by an amorphous "elaborate" partnership exception, taxpayers cannot possibly predict the tax consequences of proposed partnership transactions and therefore cannot be confident of the after-tax return on their potential investments.

B. The D.C. Circuit's Decision Casts Doubt on the Tax Treatment of Millions of Partnerships.

Partnerships that fail the D.C. Circuit's non-tax business necessity test face uncertain tax treatment. Under the Internal Revenue Code, all joint ventures are taxed as either corporations or partnerships. *See* 26 U.S.C. §§ 761(a) and 7701(a)(2), *reprinted at* App. 240a-41a.[13] The D.C. Circuit's decision, however,

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[13] The Code reflects a deliberate choice by Congress in 1932 to eliminate "uncertainty" by "placing all joint ventures, syndicates, pools, and similar organizations, which do not constitute associations or trusts, in the category of partnerships, and the members of such syndicates, pools, etc., in the category of partners." H.R. REP. NO. 72-708, at 53 (1932); S. REP. NO. 72-665, at 59

creates a new and undefined class of joint ventures whose tax treatment is not contemplated by the Internal Revenue Code.

The instant case illustrates the dilemma created by the D.C. Circuit's non-tax business necessity test. Both courts below accepted that Boca was a joint venture.[14] Boca plainly was not a corporation. It follows under the Internal Revenue Code that Boca must be treated as a partnership for tax purposes.[15] But the D.C. Circuit held that it cannot be treated as a partnership without a showing of non-tax business necessity. If Boca was not a corporation or a partnership, what was it? This is not just an academic question; it has practical import. The D.C. Circuit provides no guidance on how a non-partnership joint venture or its participants should be taxed. This no-man's-land will trap every partnership formed *with* a non-tax business purpose but *without* a non-tax business necessity.

(1932). Thus, partnership is the default classification for all joint ventures that are not corporations.

[14] *See* App 192a (noting "the joint contributions to capital, mutual decision making, and sharing of income, expenses, gains, and losses").

[15] Indeed, partnership characterization is compelled, even where parties do not choose or desire a partnership form, if the parties otherwise have the requisite profit-motivated joint activity. *See, e.g., Bergford v. Comm'r*, 12 F.3d 166 (9th Cir. 1993); *Madison Gas & Elec. Co. v. Comm'r*, 633 F.2d 512 (7th Cir 1980).

The D.C. Circuit's decision reintroduces precisely the uncertainty that Congress sought to eliminate by expanding the statutory definition of "partnership" in 1932.[16] A principal purpose of the expanded "partnership" definition was to ensure consistent tax reporting by unincorporated joint ventures and their participants.[17] This goal was reinforced by the Tax Treatment of Partnership Items Act of 1982, which contains administrative provisions designed to further foster consistent tax reporting by partners.[18] The D.C. Circuit's decision in this case undermines these legislative efforts.

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[16] *See supra* note 13.

[17] As explained in the legislative history accompanying the Revenue Act of 1932:

> Some confusion has existed over the requirements of the prior acts as to the time and manner of returning income from the operations of joint ventures, syndicates, pools, and similar organizations. . . . Moreover, a strict observance of the letter of the prior Acts would have required each member to determine his annual share in the syndicate gains or losses upon the basis of his own accounting period and according to his own method of accounting, irrespective of the accounting period or method of accounting upon which the books or records of the syndicate were kept.

H.R. REP. NO. 72-708, at 53 (1932); S. REP. NO. 72-665, at 59 (1932).

[18] The legislative history states: "Under the conference agreement, each partner is required to treat partnership items on his return consistently with the

The D.C. Circuit's decision now enables participants in investment vehicles and other joint ventures to take the position that their joint ventures are not partnerships for tax purposes if such partnerships lack a non-tax business necessity. Consequently, such participants now can legitimately report tax consequences inconsistently, with each taking its own position as dictated by its individual tax considerations.

Thus, the D.C. Circuit's decision not only disturbs settled taxpayer expectations but also significantly disrupts the administration of the tax system in an area that has otherwise been settled by decades-old precedent.

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treatment on the partnership return." H.R. REP. No. 97-760 (1982), *reprinted at* 1982-2 C.B. 600, 663.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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